IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-540

ALICE A. BOYLE and CARRIE H. BOYLE,
Petitioners,

vs.

SECRETARY OF INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Petitioners Alice A. Boyle and Carrie H. Boyle respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 2, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District

Court, and the final decision of the Department of Interior are also appended hereto.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 2, 1975. A timely petition for rehearing with suggestion of rehearing en banc was denied on August 29, 1975. On September 11, 1975 Petitioners were granted a stay of mandate until October 8, 1975 in which to file a petition for writ of certiorari with the Clerk of the United States Supreme Court. Petitioners have filed their petition within the time allowed. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether the federal courts may sustain decisions of the Department of Interior which are not supported by a scintilla of evidence appearing in the record as a whole.

2. Whether the Department of Interior may refuse to accept the uncontradicted testimony of a mining claimant, as

supported by disinterested witnesses, because it is not corroborated by documentary evidence acceptable to the Department.

3. Whether the Department of Interior continues to misapply the prudent man and marketability test by demanding as a condition precedent to a valid mining location that an undefined quantum of mineral production be removed therefrom.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

§556. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record (reproduced in appendix).

United States Code, Title 5:

§706. Scope of review (reproduced in appendix).

United States Code, Title 30:

§22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, by citizens of

the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT OF THE CASE

On June 22, 1965 the Bureau of Land Management initiated a mineral contest proceeding against Petitioners' claims, the Bulldog No. 1 and Enterprise No. 1, and alleged that the decomposed granite contained thereon was a "common variety" mineral pursuant to 30 USC §611 that could not be located under the general mining statutes after July 23, 1955. The government also claimed that a valid discovery of decomposed granite had not occurred prior to that date.

At the contest hearing held October 4, 1966, the Petitioners produced six competent witnesses, each having personal knowledge of the removal and sale of decomposed granite from both claims prior to July 23, 1955. Robert Graham, representing the contracting officer at Wil-

liams Air Force Base, located about 20 miles to the southwest of the claims, testified that between 1944 and 1947 the military removed several hundred tons of this mineral for use at the airbase. Tr. p. 145 Porter E. Beaver, a former serviceman involved in this mining operation, corroborated this account. Tr. p. 151 The military was unable to find equal or superior mineral nearer to the base. Tr. p. 152

Earl Johnson, a businessman, testified of his removal of decomposed granite between 1950 and 1959 for resale in the city of Mesa, Arizona. Tr. p. 142 The unchallenged testimony of Alice Boyle, Orson Boyle, and Elmer Boyle clearly indicated that the decomposed granite in question had commercial value prior to July 23, 1955.

The final administrative decision of December 2, 1969, reported at 76 I.D. 318 and reproduced in the appendix, held both claims null and void on the grounds that: (i) the decomposed granite was a "common variety" mineral no longer locatable after July 23, 1955, and; (ii) that a valid discovery had not occurred prior to that

date.

Petitioners appealed the Interior Department's decision to the U.S. District Court for the District of Arizona where Judge Walter E. Craig granted their motion for summary judgment on May 8, 1972. The District Court's decision, reproduced in the appendix, held that the administrative invalidation of Petitioners' claims was not supported by substantial evidence.

The Court of Appeals reversed the District Court on July 2, 1975 and held as a matter of law that Petitioners' "general unsupported claims of sales in unspecified amounts" (i.e. lack of documentary proof) amounting to $100 of specifically identified sales over an eight-year period, was insufficient as a matter of law to meet the marketability test approved by this Court in United States v. Coleman, 390 U.S. 599 (1968). The decision of the Court of Appeals has thereby raised controversial and recurring questions of administrative and mining law which are of peculiar gravity and general importance, and therefore warrant the exercise by this Court of its general powers of supervision.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE DECISIONS IN OTHER CIRCUITS AS TO THE PROPER INTERPRETATION OF 5 USC §706

It is settled law that actions of the Department of Interior are reviewable in the federal courts under the Administrative Procedures Act, and in particular the relevant provisions thereof which are codified under 5 USC §§556, 557, and 706. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), rehearing 379 F.2d 555, reversed other grounds 390 U.S. 599; Humboldt Placer Mining Co. v. Best, 185 F.Supp. 290 (Cal. 1960), vacated 293 F.2d 553, reversed 351 U.S. 334.

Under section 706 (2)(E) of Title 5, U.S. Code, the reviewing federal court must hold unlawful and set aside any agency finding or conclusion found to be unsupported by substantial evidence. All consideration of the whole record, or the parts thereof cited by a party, and supported by and in accordance with the reliable, probative, and substantial evi-

dence. 5 USC §556(d). Except as otherwise provided by statute, the proponent of a rule or order bears the burden of proof. 5 USC §556(d)

The substantial evidence required to sustain an administrative agency's finding of fact implies a quality of proof which induces conviction and which makes a definite impression on reason. United States ex rel. Lindeman v. Watkins, 73 F. Supp. 216 (N.Y. 1947), reversed on other grounds 164 F.2d 457.

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938) It must do more than create a suspicion of the existence of the fact to be established, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951); Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966) As a matter of language, substantial evi-

dence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less--- to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. S. Rep. No. 752, 79th Cong., 1st Sess. 30-31 cited in Universal Camera, supra, at p. 484.

The invalidation of a mining location by the Department of Interior upon mere conclusions, for which no prima facie substantiation exists in the record, renders the administrate decision of no effect and void for lack of substantial evidence. Denison v. Udall, 248 F. Supp. 942 (Ariz. 1965)

This point is illustrated by the holding of Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972), involving the validity of a placer mining claim for

sand and gravel that was located in 1946 upon lands removed from mineral entry in 1948. The ultimate question of law and fact was whether or not a discovery of valuable mineral has occurred upon the claim between 1946 and 1948.

The Department of Interior found that there was no discovery prior to the 1948 withdrawal date because the claim contained common variety mineral, of which absolutely no commercial removal and disposition had been made by Verrue. The Department simply equated lack of sales as synonomous with lack of marketability.

The Court of Appeals affirmed the District Court's reversal of the Department's decision with the following analysis:

> In determining whether the Secretary's decision was based on substantial evidence, this court finds the following language from Foster, supra, at 271 F.2d 836, 838 persuasive:
>
> ". . . the case really comes down to a question whether the Secretary's finding was supported by substantial

evidence on the record as a whole. We think it was. The testimony of Shafer and his colleagues in support of the Government was clearly substantial and most certainly was not destroyed. He was an experienced man, knew sand and gravel, knew the Las Vegas area, and his testimony was clear, succinct and convincing." [emphasis added]

The government presented three witnesses, none of whom were in the Phoenix area from 1946 to 1948; nor did any one of them have personal knowledge of the sand and gravel market during that time. Since the crucial issue is the "marketability" of the sand and gravel during the 1946-48 period, their testimony sheds no light on that issue.

On the other hand, the appellee presented three witnesses, besides himself, all of whom testified directly as to the "marketability" of sand and gravel in the immediate vicinity of the Sandy No. 2 claim during the 1946-48 period. This testimony was clearly competent to establish the existence of a market for the material present on the claim.

It appears that the Secretary's decision was based solely on his findings that there were no sales of sand and gravel at a profit from the claim and that there was evidence of an abundance of material in the area other than on the Sandy No. 2 claim, despite the uncontradicted evidence introduced by appellee that the material on Sandy No. 2 was marketable at a profit during the 1946-48 period. In determining marketability, evidence of sales is only one factor to be considered in the application of the prudent man and marketability tests. See Coleman, supra. In our opinion this lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusions of the Secretary, when, as here, there is positive evidence in the record of marketability. [emphasis supplied] 457 F.2d at 1203-4

At the mineral contest hearing in Verrue the government at least attempted to present evidence of a lack of marketability; however, no such effort was made

in the instant case. Louis S. Zentner, the government's only witness had no personal experience with the pre-July 23, 1955 market. He did not come to Phoenix until 1966. Tr. p. 14 Similarly, the report of Charles K. Miller merely indicated 1969 market prices. The government presented no other evidence.

There is absolutely nothing in the record to rebut the testimony of Petitioners' witnesses that the decomposed granite upon the Bulldog No. 1 and Enterprise No. 1 claims was marketable at a profit prior to July 23, 1955.

The affirmance by the Court of Appeals of an administrative decision on the grounds that said decision is supported by substantial evidence, when in fact it is unsupported by even a scintilla of evidence, amounts to nothing short of a "judicial repeal" of the substantial evidence test as defined by this Court, and as required by 5 U.S.C. §706. Future adherence to this "diluted" standard of review by the lower federal courts can only make judicial review of administrative decisions a meaningless futility.

The decision below is a far departure from the accepted and usual course of judicial proceedings, and sanctions similar departures by the lower courts; therefore, this case merits the exercise by this Court of its general powers of supervision.

2. THE DECISION BELOW RAISES CONTROVERSIAL QUESTIONS OF THE APPLICATION OF 5 U.S.C. §556 REGARDING THE CORRECTNESS OF AN ADMINISTRATIVE AGENCY'S REFUSAL TO CONSIDER UNCONTESTED TESTIMONY WHICH IS SUPPORTED BY THE TESTIMONY OF DISTINTERESTED WITNESSES BUT NOT CORROBORATED BY DOCUMENTARY EVIDENCE

The Assistant Solicitor found that the unchallenged testimony of Petitioners' six witnesses on the question of production and sales prior to July 23, 1955 was "not persuasive," and consisted only of "unsupported statements" about matters "that are, or should be, readily sustainable by other evidence" since the mining claimant must produce adequate records to "demonstrate his assertions that he has disposed of material from the claims."

76 I.D. at p. 324; appendix pp. 27a-28a No citation of authority is given by Mr. Hom.

The Interior regulations governing mineral contest proceedings at the time of Petitioners' hearing made no requirement of corroboration of any kind, even though the Secretary has long required testimonial corroboration of a disinterested witness in order to qualify for issuance of a mineral patent under 30 U.S.C. §38. See 43 C.F.R. §3862.3-3 (1972)

The only mention of documentary evidence in the current regulation is that the Administrative Law Judge may receive the same if pertinent to any issue. 43 C.F.R. §4.452-6(a) (1974)

United States Code, Title 5, §556(d) provides in pertinent part as follows:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence. . . (emphasis added) The transcript of testimony, exhibits, pleadings and motions constitute the exclusive record for decision. 5 U.S.C. §556(e)

The foregoing provisions of 5 U.S.C. §556(d) and (e) are rendered a complete nullity if the courts, in applying the substantial evidence test, may not examine unchallenged testimony which the Department of Interior found unpersuasive because it was not corroborated by documentary evidence produced from "adequate records."

Administrative decision based upon erroneous legal standards is prejudicial error and cannot stand. Golabek v. Regional Manpower Administration, 329 F. Supp. 892 (Pa. 1971)

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE PROPER APPLICATION OF THE PRUDENT-MAN AND MARKETABILITY TEST APPROVED BY THIS COURT

In determining what constitutes a valuable mineral deposit, or "discovery" under 30 U.S.C. §22, this Court has expressly sanctioned the "prudent-man" test which states:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. Best v. Humboldt Mining Co., 371 U.S. 334, 336 (1962)

Also, the marketability test, a complementary refinement of, but not a separate standard to the prudent-man test, requires a showing that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968) As Coleman held:

> Minerals which no prudent man will extract because there is

> no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test. . . 390 U.S. at 602-3

Coleman did not establish any mineral level of production in order to show marketability. The courts have rejected any necessity of prior production in order to show that the claim can be operated at a profit. Multiple Use. v. Morton, 353 F. Supp. 184 (Ariz. 1972); Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); Adams v. United States, 318 F.2d 861, 870 (9th Cir. 1963)

Nevertheless, the Department of Interior continues to apply the "marketability test" as if it were a "production test." This was very evident in the Verrue case cited at page 9 above where the Department held that:

> ". . . there was no reason to believe that the market demand was sufficient to require all available sand and gravel in the area, and that when the contestees failed to enter the race to supply the theoretical

> insufficiency . . . the failure contradicted the speculative, hypothetical and theoretical position of the claimants that because others developed pits and profitably sold material they could do so as well. United States v. Ramstad, A-30351 (Sept. 24, 1965) cited in United States v. Verrue. 75 I.D. 300, 305 (1968)

Because Verrue had made no sales at all, and thereby pre-empted a portion of the existing market, the Secretary held that he had not shown profitability as required by the marketability test, even though it was the unchallenged testimony of his witnesses that his claim could have been profitably developed. The Court of Appeals rejected the pre-emption theory and held that evidence of sales is only one factor to be considered in the application of the prudent-man and marketability tests. Verrue v. United States, supra.

It is clear in the instant case that evidence of sales was the only factor considered by Mr. Hom. He identified Petitioners' production, after ignoring the testimony of their witnesses, as showing

a "few intermittent sales consummated on a rather off hand basis" as the result of "small business" operations. Whether a discovery of valuable mineral is made by a big business or little businessman is immaterial under the law. The market report of Charles Miller, relied upon by Mr. Hom's decision, conclusively shows that Petitioners' decomposed granite enjoys a market in the Phoenix area and can be sold as far as 30 miles away in Phoenix at competitive prices. Appendix, p. 18a There is nothing in the record to rebut Petitioners' evidence that this market existed prior to July 23, 1955.

In determining marketability, Mr. Hom made no inquiry into profitability as set forth in the marketability test approved in Coleman. Interior Department contest proceedings continue to examine only sales as evidence of marketability, and the decision below has tacitly approved this practice.

If sales are to be the sole measure of marketability, how much production is required to qualify? Mr. Verrue is told he has no discovery because he made no

sales. Petitioners are told they have no discovery because they only have random sales. Complete authority over the public lands is vested in Congress, therefore the deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in authorized assumption by an agency of major policy decisions properly made by Congress. American Ship Bldg. Co. v. N.L.R.B., 380 U.S. 300 (1965) This is especially true when the Department determines the adequacy of sales on an ad hoc, or case-by-case basis.

The proper application of the marketability test is a recurring question of great importance, for which it is within the public interest to have decided by the court of last resort.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

HALE C. TOGNONI
Counsel for Petitioners

October 6, 1975

APPENDIX

United States Code, Title 5:

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence---

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions

in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may---

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural

requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may,

when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L 89-554, Sept. 6, 1966, 80 Stat. 386.

United States Code, Title 5:

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2690

ALICE A. BOYLE & CARRIE H. BOYLE,
Plaintiffs-Appellees,

versus

ROGERS C. B. MORTON, Secretary of the Department of the Interior of the United States of America,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

(July 2, 1975)

Before BROWNING and GOODWIN, Circuit Judges, and KING, District Judge

PER CURIAM: REVERSED AND REMANDED

Opinion and Order of Reversal and Remand to the United States District Court for the District of Arizona (July 2, 1975)

The Secretary's decision, reported at 76 I.D. 318, must be sustained.

The Secretary's finding that there had been no discovery of a valuable deposit of decomposed granite within the limits of appellees' claims prior to July 23, 1955, is supported by substantial evidence. Most of appellees' proof consisted of general unsupported claims of sales in unspecified amounts. Specifically identified sales totaled about $100 over an eight-year period. This was not enough to establish, as a matter of law, that the marketability test of United States v. Coleman, 390 U.S. 599 (1968), was satisfied.

The record also supports the Secretary's finding that the red, gold, and pink decomposed granite found on appellees' claims was a "common variety" of stone and, by the terms of 30 U.S.C. §611, therefore could not be the basis for a

valid mining claim. The record shows that a large quantity of colored decorative decomposed granite similar to appellees' was available from other deposits in the same general marketing area. The Secretary therefore properly compared the price of appellees' decomposed granite only with the price of this similar decorative granite, and not with the price of all decomposed granite, in determining that appellees' granite did not have a "distinct and special value." Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974).

Reversed and remanded for entry of summary judgment for appellant.

In The
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-71-491 PHX-WEC

ALICE A. BOYLE & CARRIE H. BOYLE,
Plaintiffs,

vs.

ROGERS C.B. MORTON, Secretary of the Department of Interior of the United States of America,
Defendant

ON APPEAL FROM THE UNITED STATES
DEPARTMENT OF INTERIOR

(May 4, 1972)

Before WALTER E. CRAIG, District Judge

ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFFS,
REMAND TO THE DEPARTMENT OF INTERIOR

Opinion and Order Granting Summary Judgment for Plaintiffs, and Remanding Case to the Department of Interior
(May 4, 1972)

Plaintiffs seek judicial review of a declaration of the Department of the Interior, which found the Enterprise No. 1 and the Bull Dog No. 1 placer mining claims were invalid.

The parties have filed cross motions for summary judgment, which came on for hearing on April 3, 1972.

The Court having considered the entire administrative record, the memoranda on file and the arguments presented, finds as follows:

1. That on October 27, 1964, plaintiffs filed mineral patent application Arizona 034343 for the Enterprise No. 1 and Bull Dog No. 1 placer mining claims;

2. That by decision dated December 2, 1969, (A-30922 (Supp.), 71 I.D. 318), the Assistant Solicitor for Land Appeals, acting under delegated authority of the Secretary of the Interior, affirmed a decision of the Office and Appeals and Hearings, Bureau of Land Management, sus-

taining the determination of a hearing examiner that the Enterprise No. 1 and the Bull Dog No. 1 placer mining claims were invalid;

3. That the Assistant Solicitor of the Department of the Interior found the claims to be invalid for the following reasons:

(a) That the material involved was a common variety and not subject to location under the mineral laws subsequent to July 23, 1955.

(b) That plaintiffs failed to show a discovery of a valuable mineral deposit within the claims prior to July 23, 1955.

4. That the determination of the Assistant Solicitor that the material found on the mining claims was not a valuable deposit of mineral and that there was no discovery of a valuable deposit of mineral within the limits of the claims on July 23, 1955, is not supported by substantial evidence in the administrative record.

5. That the material found within the mining claims has special and distinct qualities and is not a common variety.

6. That there is no material question of fact and plaintiffs are entitled to judgment as a matter of law.

IT IS ORDERED AND ADJUDGED:

1. That defendant's motion for summary judgment is denied.

2. That plaintiff's motion for summary judgment is granted.

3. That this case be remanded to the Bureau of Land Management, Department of the Interior, for appropriate action consistent herewith.

DATED this 4th day of May, 1972.

/s/ WALTER E. CRAIG
United States District Judge

In The
UNITED STATES DEPARTMENT OF INTERIOR

No. A-30922 (Supp.)

UNITED STATES,
Contestant,

v.

ALICE A. and CARRIE H. BOYLE,
Contestees

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

(December 2, 1969)

Before ERNEST F. HOM, Assistant Solicitor

MINING CLAIMS DECLARED NULL AND VOID

Opinion of the Assistant Solicitor
Declaring Placer Mining Claims
Null and Void

(December 2, 1969)

In a decision dated March 26, 1969, 76 I.D. 61, the Department remanded this case for the development of fuller and clearer evidence on the competitive prices of decomposed granite in the Phoenix area.

The parties have each submitted a report by Hamilton A. Higbie, a registered geologist. Higbie's report adds little to the evidence presented at the hearing. After discussing the physical characteristics of the decomposed granite, he cites a statement of Earl Gudd, owner of the B & B Granite Company, who was a witness at the hearing. Gudd repeated his testimony that the price for landscaping granite varies from $1.50 to $3.50 per cubic yard, that competitors in the area of Apache Junction received approximately $1 per cubic yard less for an inferior quality of granite.

Higbie then says that he spoke with other unspecified dealers selling landscaping granite in the area and that

their prices were almost consistently $2 less than that obtained by B & B. B & B, he says, gets $6 per cubic yard for pit run material at Scottsdale, while its competitors were selling at prices of $3.85 to $4 per cubic yard. He also reports that at Mesa the owners of Dreamland Villa paid B & B $1-$1.50 per cubic yard more than they could get other granite for, but paid the higher price for the superior qualities of the B & B material. He further states that the Farnsworth Realty and Construction Company, the developers of Dreamland Villa, has used B & B's landscaping granite exclusively for the past "seven to eight years" due to its superior quality and that they purchase about $1,000 worth of B & B granite per month.

The contestant, in turn, submitted a report of Charles K. Miller, a mining engineer. Miller made a detailed study of the location of pits selling decomposed granite in the general area of Phoenix and interviewed both buyers and sellers. He found that in the Mesa-Apache Junction area the best sources of decomposed granite are the contestees' claims, two pits

in the Salt River Indian Reservation, about 10 miles northwest of contestees' claims, and six in the Tonto National Forest, which lie about a half mile north of the contestees' locations. He divided the market into five areas designated as Phoenix, Scottsdale, Tempe, Mesa, and Apache Junction. After consulting both sellers and buyers of decomposed granite, he compiled a table showing the delivered prices at which each seller sold a cubic yard of granite in each market area. The chart shows that, except in Phoenix, B & B, which is the lessee of contestees' claims and sells all the materials taken from it, obtains no greater price for its product than any of its competitors. Several firms, one operating from Salt River Indian Reservation, reported selling prices substantially higher than those of B & B and the other competitors.

While Miller found price variations among the various colors of decomposed granite, with red and pink commanding a higher price than bronze (gold), he found, except as noted above, no difference between suppliers for the same colors. The price various from area to area were

largely a matter of more intensive competition near the source of supply and the expense of haulage to the more distant area.

As to the Phoenix area, Miller said that Pit No. 1, some 20 miles north of the city, is considered the best source of decomposed granite from the standpoint of quality and quantity. Madison Granite, which operates Pit No. 1, reported that it sold and delivered to Zone 1 in Phoenix at $3 to $3.50 per cubic yard. Other sellers gave as their selling prices amounts ranging from $2.50 for gray to $7.40 for gold and red. B & B sold for $5 to $7 per yard.

The gold (bronze) granite is the best volume seller in the general market area and is preferred in the Phoenix, Scottsdale, and Tempe areas. The red is preferred in Mesa and Apache Junction areas. As far as prices in Apache Junction are concerned, all 4 sellers in the area, including B & B, sold red, pink, and gold granite for the same price, $1.50 per cubic yard.

The most this evidence establishes is

that some of the relatively small demand for red and pink decomposed granite in Phoenix is met by material from the Apache Junction area, but at a price which, considering the distance and costs of haulage in the urban area, does not demonstrate any special value for it. In the nearest market, Apache Junction, where competition is keen, contestees' granite sells at the same price as the granite of 3 competitors. In the other marketing areas, also, as we have seen, it commands no higher price than that of its competitors and in some instances, less.

Miller too consulted Gudd of B & B, which he described as the largest volume supplier of decomposed granite in the Apache Junction area. Gudd, he says, stated that B & B sold granite in Phoenix for $5-$7, in Scottsdale for $3-$4, in Tempe for $3, in Mesa for $2 to $2.50, and in Apache Junction for $1.50. Ross Farnsworth, of Dreamland Villa, said his firm paid $2.50 for red and $2 for gold granite per cubic yard at Mesa and that they will use about 2200 cubic yards in 1969. The material is used for both roads and landscaping.

The figures developed by Miller are

at variance with those submitted by Higbie. We find the depth and detail of Miller's report more convincing and accept his statements as representing the actual conditions in the market.

We conclude then that as a material used for the same purposes as that taken from other deposits of widespread occurrence and as one which is not sold at a higher price than other similar materials, contestees' decomposed granite has no special and distinct value and is a "common variety" of stone within the meaning of the act of July 23, 1955, 30 U.S.C. sec. 611 (1964). Therefore, contestees' claims cannot be found valid on the basis that the deposit found on them is an uncommon variety of stone which is still open to location under the mining laws.

The contestees, however, allege that the claims are valid for other reasons. Having in the earlier decision left these for consideration, pending the resolution of the issue we have just discussed, we now turn to them.

First, the contestees contend that since they have held their claims as lode claims and worked them as placer for over

16 years prior to July 23, 1955, they are entitled to a patent, pursuant to Rev. Stat. sec. 2332, 30 U.S.C. sec. 38 (1964). This section provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working on the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The contestees assert that they have satisfied all the requirements of the statute.

However, if Rev. Stat. sec. 2332 is available to them, they still must do more than show compliance with it, for it is well established that Rev. Stat. sec. 2332 does not constitute an independent means of obtaining a patent to a mining claim. Most important of all, it does not dispense with the necessity of a valid discovery. Cole v. Ralph, 252 U.S. 286, 307 (1920); Susie E. Cochran et. al. v. Effie v. Bonebrake et al., 57 I.D. 104 (1940);

Harry A. Schultz et al., 61 I.D. 259, 263 (1953). Thus, until the claimants can demonstrate that there is a valid discovery on each of the claims within the meaning of the mining laws the claims cannot be patented.

The contestees asserted that the claims were valuable on account of several minerals. They offered testimony that the claims had been worked for gold obtained by mining and milling the decomposed granite, the mine dumps, and the mill tailings. But whatever the past history of the claims may have been, there is no evidence that the claims are now valuable for placer gold. Similarly the recounting of the past use of limestone (1914-1940) from the claims to make mortar was not joined with proof that there is a present market for it or that the limestone is still locatable as an uncommon variety of stone. (Tr. 168; Ex. B). In the absence of proof that a mineral deposit is of present value, the claim is not valuable for that mineral within the meaning of the mining laws. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

The only other mineral on the claims

that could support a discovery is, of course, the decomposed granite. But since we have concluded that it is not an uncommon variety of stone, it would have to be shown that a discovery of the material, within the ambit of the prudent man rule as refined by the marketability rule, had been made prior to July 23, 1955.

Before we consider that issue, however, we turn to the contestees' second major contention, which is that their placer locations, filed in 1964 as amendments of their lode locations, related back to the original lode locations made in 1939. The hearing examiner, as we noted in the original decision, held that the validity of the claims was to be judged as of the date of the location of the claims as placers in 1964. He refused to consider the placer locations to be amendments of the 1939 lode locations, as amended in 1941.

Here again the same considerations that were applicable to the discussion of Rev. Stat. sec. 2332 apply. The 1939 locations, if they were enough to sustain mining claims, lost their validity when the gold in lode, or even in placer form, and the limestone were worked out. A

location without a discovery cannot validate a mining claim. Cole v. Ralph, supra, 295-296.

Again, therefore, if the relation back of the 1964 placer locations to 1939 is to aid appellants at all, it is necessary for them to show that they had made a valid discovery of the decomposed granite prior to July 23, 1955. We now address ourselves to that issue.

In order to satisfy the requirements of discovery, the appellants must show that as of July 23, 1955, the deposits from each claim could have been extracted, removed, and marketed at a profit. Marketability can be demonstrated by a favorable showing as to such factors as accessibility of the deposit, bona fide in development, proximity to a market, and the existence of a present demand for the material, that is, a demand when the deposit was subject to location. Unites States v. Coleman, 390 U.S 599 (1968); Foster v. Seaton, 271 F.2d 836, (D.C. Cir. 1959); United States v. Alfred N. Verrue, 75 I.D. 300 (1968).

What evidence did appellants present

of marketability of the decomposed granite prior to July 23, 1955?

Robert Graham, a technical representative for the contracting officer at Williams Air Force Base, some 20 miles from the claims, who was in charge of all payments, maintenance, and new work, testified that "several hundred tons" of material from the Boyle claims were used in 1944-1947 to surface driveways, parking lots and even sidewalks on the airbase (Tr. 143, 144, 145), but that none had been used since 1947 (Tr. 147).

Elmer Boyle, the husband of Alice Boyle, testified that a lot of granite had been removed between 1947 and 1955, that it sold for 0.5 cent a yard if the purchaser loaded it himself (Tr. 171-173).

In an affidavit submitted as her testimony at the hearing (Ex. B), Alice Boyle stated that there has been "continuous" production of decomposed granite from the claims since the early 1940's, that a computation of the material removed could come to over 400,000 cubic yards, although Zentner, the Bureau of Land Management mineral examiner, had conservatively estimated it to be at least 30,000

cubic yards, that few records were kept of sales prior to June of 1955, but that Hubert Massey excavated and removed material in 1951 and 1952, and John Wing did the same in 1952, with one sale being for 1000 yards. She also said that Gail Boyle removed material from the claims in 1955 and 1956 for a small business he ran in Mesa, selling materials to residents there for driveways, and that there were numerous other small sales of which no records were kept.

She next states that in 1959 the claims were leased to Mr. Brisbois who removed 23,929 yards at 0.5 cent per yard from 1959 to 1962. Brisbois then assigned the lease to Earl Gudd who, she said, has since removed 18,215 yards at 0.6 cent per yard.

The crucial parts of Mrs. Boyle's testimony are those that relate to the sales made prior to July 23, 1955. Aside from general allegations that sales were made on a continuing basis, her testimony itself adverts only to a few sales in small amounts. She did not say what the airbase sales amounted to, but that a receipt dated February 19, 1948, representing

only part of the sales, was for 500 cubic yards at 0.5 cent a yard (Tr. 110). We have noted that Graham testified that "several hundred tons" were used on the base. At 0.5 cent a yard, a sale of 1,000 yards would have returned only $50 for the period 1944-1948. The sales claimed for 1951 and 1952 were for unspecified amounts and were unsupported by any business records or other corroboration. Again the only definite sale recalled disposed of 1,000 cubic yards. Finally, the statement that Gail Boyle removed material in 1955 and 1956 is totally devoid of supporting details and besides refers to "a small business" run by Boyle; moreover, it does not necessarily indicate even that sales were made prior to July 23, 1955.

The most this testimony establishes is that there were a few intermittent sales of decomposed granite consummated on a rather off hand basis. Since it is a claimant's obligation to prove the validity of his claim, it is his responsibility to keep records adequate to demonstrate his assertions that he has disposed of material from the claims. His unsupported statements about matters that are, or

should be, readily sustainable by other evidence are not persuasive.

We cannot conclude that the contestees have demonstrated by a preponderance of the evidence that they have satisfied the test to support a discovery of a common variety of decomposed granite prior to July 23, 1955, within the meaning of the mining laws.

Accordingly, the mining claims were properly declared invalid.

The appellants have recently requested an opportunity to present oral argument. We do not believe that oral argument is necessary or would be helpful to an understanding of the applicable law or evidence. Consequently the request is denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Office of Appeals and Hearings is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

Certificate of Service

I hereby certify that on this 6th day of October, 1975, three copies of the Petition for Writ of Certiorari were sent by certified mail to the Solicitor General, Department of Justice, Washington D. C. 20530, counsel for Respondent, as required by Rule 33(2)(a). I further certify that all parties required to be served have been served.

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